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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES  
INDUSTRIES, INC., *et. al.*

Plaintiffs,  
v.

GARY FUNG, *et. al.*

Defendants.

Case No. **CV-06-05578 SVW (JCx)**

**PLAINTIFFS' REPLY BRIEF IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT ON  
WILLFUL AND INNOCENT  
INFRINGEMENT UNDER 17 U.S.C.  
§ 504(C)(2)**

Date: September 30, 2013  
Time: 1:30 PM  
Ctrm: 6

Judge: The Hon. Stephen V. Wilson

1  
2 The issue presented in this motion could not be more straightforward. This  
3 Court has already found, and the Ninth Circuit has affirmed, that the “evidence of  
4 Defendants’ *intent* to induce infringement is overwhelming and beyond reasonable  
5 dispute.” *Columbia Pictures Indus., Inc. v. Fung*, No. CV-06-05578 SVW (JCx),  
6 2009 WL 6355911, at \*11 (C.D. Cal. Dec. 21, 2009) (emphasis added), *aff’d* 710  
7 F.3d 1020 (9th Cir. 2013). These findings establish conclusively, as a matter of both  
8 law and logic, that Defendants acted willfully and, therefore, that they cannot claim  
9 the status of “innocent” infringers. Defendants’ opposition brief offers nothing to  
10 overcome this inescapable result and, instead, reveals only that Defendants wish to  
11 re-litigate the settled facts of this case with arguments and defenses that this Court  
12 has already rejected. Plaintiffs are thus entitled to summary judgment on the issues  
13 of Defendants’ willfulness and their asserted defense of “innocent” infringement.

14 **I. The Court’s Prior Findings Establish Defendants’ Willfulness And Lack**  
15 **Of Innocence As A Matter Of Law.**

16 A. Defendants Fail To Identify A Meaningful Distinction Between Their  
17 Inducement Of Infringement And Their “Willfulness.”

18 This Court has already concluded that Defendants’ inducement of  
19 infringement was both “intentional” and “purposeful.” *See* 2009 WL 6355911, at  
20 \*11 (Defendants had the “intent” to induce copyright infringement); *id.* at \*15  
21 (Defendants engaged in “purposeful, culpable conduct in inducing third party  
22 infringement”). The Ninth Circuit affirmed this Court’s decision, holding that  
23 “Fung offered his services with the *object* of promoting their use to infringe  
24 copyrighted material. *No reasonable jury could find otherwise.*” *Columbia Pictures*  
25 *Indus., Inc. v. Fung*, 710 F.3d 1020, 1035 (9th Cir. 2013) (emphasis added).

26 Try as they might, Defendants fail to show how these unequivocal findings of  
27 their intentionality do not also necessitate a finding of their willfulness for purposes  
28 of Section 504(c)(2) of the Copyright Act. That is because it is logically impossible

1 to do so, as previous courts have already found in indistinguishable circumstances.  
 2 *See Arista Records LLC v. Usenet.com, Inc.*, No. 07 Civ. 8822 (HB), 2010 WL  
 3 3629587, at \*5 (S.D.N.Y. Sept. 16, 2010); *Arista Records LLC v. Lime Group LLC*,  
 4 No. 06-cv-05936 (S.D.N.Y.), Order, April 26, 2011 (Dkt. #712); Pltfs' Br. at 6-7.<sup>1</sup>

5 Defendants maintain that inducement and willfulness are "distinct legal  
 6 standards" that require "distinct factual inquiries," Defs' Opp. Br. at 5-8, but  
 7 nowhere do they explain how these supposed distinctions – assuming they exist –  
 8 make any difference here. Indeed, if there were any difference in the legal  
 9 standards, it would be that the standard for willfulness is *easier* to meet than the  
 10 standard for inducement. *Compare, e.g., Metro-Goldwyn-Mayer Studios Inc. v.*  
 11 *Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005) ("one who distributes a device with the  
 12 object of promoting its use to infringe copyright, as shown by clear expression or  
 13 other affirmative steps taken to foster infringement," is liable for inducement) *with*  
 14 *Washington Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 674 (9th Cir. 2012)  
 15 ("a finding of 'willfulness' in the copyright context can be based on either  
 16 'intentional' behavior, or merely 'reckless' behavior . . .") (quotation marks and  
 17 alteration omitted).<sup>2</sup> Having satisfied the requisite "intent" standard for inducement,  
 18 it follows necessarily that Defendants' conduct was "willful" as well.

19 Ignoring this inevitable conclusion, Defendants posit that "one who has been  
 20 notified that his conduct constitutes copyright infringement, but who reasonably and  
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22 <sup>1</sup> Defendants suggest that these cases were unique to their "particular facts and  
 23 circumstances," Defs' Opp. Br. at 10, but nowhere do they identify how any such  
 24 "facts or circumstances" meaningfully distinguish those cases from the present one.

25 <sup>2</sup> Defendants challenge the Ninth Circuit's articulation of the willfulness standard in  
 26 *Washington Shoe* as mere dicta, Defs' Opp. Br. at 7, but this challenge is not a  
 27 serious one. As is evident from the Ninth Circuit's opinion and the many cases cited  
 28 therein, the Court articulated a standard of willfulness that is well established in this  
 Circuit and elsewhere, as an essential part of its holding. 704 F.3d at 674.

1 in good faith believes the contrary,” *might* be liable for inducement but not for  
 2 willfulness. Defs’ Opp. Br. at 8 (quotation omitted). But Defendants offer neither  
 3 reasoning to explain, nor case law to illustrate, why this is so – or how a person  
 4 acting “reasonably and in good faith” could simultaneously be liable for inducement  
 5 but not for willfulness. Inducement requires intentional conduct; willfulness can be  
 6 established through a showing of reckless (*i.e.*, non-intentional) conduct. In any  
 7 event, this Court has already rejected Defendants’ suggestion that their claims to  
 8 “reasonable” or “good faith” actions could somehow, on the record of this case,  
 9 overcome the finding of Defendant’s unambiguous intent to foster infringement:

10 [T]o the extent that Defendants subjectively believe that their users  
 11 have not engaged in copyright infringement, Defendants’ ostrich-like  
 12 refusal to discover the extent to which its system was being used to  
 13 infringe copyright is merely another piece of evidence of Defendants’  
*purposeful, culpable conduct.*

14 2009 WL 6355911, at \*15 (emphasis added).

15 Neither can Defendants take refuge in those cases that found willfulness to be  
 16 a question of fact for the jury. Defs’ Opp. Br. at 11 (citing cases).<sup>3</sup> In each of those  
 17 cases, it was “not beyond peradventure that a reasonable jury would conclude” that  
 18 the defendant had not acted willfully. *Island Software & Computer Serv. v.*  
 19 *Microsoft Corp.*, 413 F.3d 257, 263-64 (2d Cir. 2005) (summary judgment denied  
 20 where there was no “conclusive evidence of [defendant’s] actual knowledge” of  
 21 infringing activities and “possible explanations” of defendant’s conduct were  
 22  
 23

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24 <sup>3</sup> Notably, in one of the cases that Defendants cite, the Court actually *granted*  
 25 summary judgment to the plaintiff on the question of willful infringement, having  
 26 found that the defendant “knowingly allowed others to upload and download” the  
 27 copyrighted works. *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 936 (N.D. Cal.  
 28 1996).

1 consistent with lack of infringing intent).<sup>4</sup> In stark contrast, this Court and the Ninth  
 2 Circuit have already held in this case that “[n]o reasonable jury could find  
 3 otherwise” than that Defendants acted purposefully, with the intent to foster  
 4 infringement. 710 F.3d at 1035; *see also* 2009 WL 6355911, at \*11 (“evidence of  
 5 Defendants’ intent to induce infringement is overwhelming and beyond reasonable  
 6 dispute”). In light of these findings, Defendants’ infringing conduct plainly was  
 7 “willful” for purposes of the Copyright Act and that, by definition, Defendants  
 8 cannot establish a defense of “innocent” infringement. Defendants should not be  
 9 permitted to re-litigate these fundamental factual findings at trial.

10 B. The Court’s Prior Findings Are Not “Stale.”

11 Defendants devote much of their brief to suggesting that they reformed  
 12 themselves at some point after having been found to be intentional infringers. Defs’  
 13 Opp. Br. at 2, 8-10, 12-13. According to Defendants, this Court’s findings of their  
 14 purposeful, culpable conduct have grown “stale” over time and cannot conclusively  
 15 establish Defendants’ willfulness indefinitely, beyond the point of these supposed  
 16 reforms. Defendants’ argument misses the mark in at least two respects.

17 First, as Defendants are well aware, Plaintiffs plan to prove damages on the  
 18 basis of infringements that occurred *before* the Court entered the Injunction – and  
 19 thus before Defendants implemented any so-called reforms on the Isohunt website.  
 20 *See* Doroshov Dec., Ex. A, ¶ 4 (the website server data Defendants produced, and  
 21 on which Plaintiffs’ claims of direct infringement are based, ends in May 2010).  
 22 None of the infringements at issue in the upcoming damages trial – not one –

23 \_\_\_\_\_  
 24 <sup>4</sup> *See Hearst Corp. v. Stark*, 639 F. Supp. 970, 980 (N.D. Cal. 1986) (declining to  
 25 make finding of willful infringement because case “raises questions of first  
 26 impression”); *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 66 (1st Cir. 2000)  
 27 (remanding case that had been decided by judge, rather than jury, prior to Supreme  
 28 Court’s determination in *Feltner v. Columbia Picture Television, Inc.*, 523 U.S. 340  
 (1998), that statutory damages must be determined by a jury).

1 occurred after the issuance of the Injunction in May 2010. Thus, whatever  
 2 subsequent reforms Defendants may claim to have made in connection with their  
 3 filter *after* the Court entered the Injunction, as a factual matter, they are wholly  
 4 irrelevant to the infringements at issue here.<sup>5</sup> The Court's findings of Defendants'  
 5 "purposeful, culpable conduct," therefore, are fully applicable to all of the  
 6 infringements on which Plaintiffs are seeking damages.

7 Second, this Court has already rejected these very same arguments, finding  
 8 that "Defendants' past and present statements and conduct establish that Defendants  
 9 'fully intend to continue their distribution of the' tools that are central to their  
 10 inducement of copyright infringement." *Fung*, Order Granting Plaintiffs' Motion  
 11 For Permanent Injunction, Dkt. # 426 (May 20, 2010), at 8 (alterations omitted); *see*  
 12 *also id.* at 3-10 (quoting at length from this Court's order in *Grokster V*).<sup>6</sup> This  
 13 conclusion plainly forecloses any suggestion that the Court's earlier findings of  
 14 Defendants' culpable intent have somehow grown "stale."

## 15 **II. Defendants' Arguments Concerning The Works In Suit Are Irrelevant.**

16 Defendants offer a hodgepodge of additional arguments for why, in their  
 17 view, summary judgment should be denied in favor of further discovery on the  
 18 issues of willfulness and innocent infringement. Each of these arguments is wholly  
 19 irrelevant to the issues presented by Plaintiffs' motion.

### 20 **A. Defendants Have Received Plaintiffs' List Of Works In Suit.**

21 Defendants contend that summary judgment is premature because, at the time  
 22 of their opposition, they had not yet received Plaintiffs' list of works in suit. Defs'

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24 <sup>5</sup> As the recent briefing on the issue of Defendants' contempt makes clear,  
 25 Defendants' inducement continues unabated to this day. Plaintiffs' Brief Re  
 26 Defendants' Contempt Pursuant To The Court's August 7, 2013 Order, Dkt. # 599.

27 <sup>6</sup> The Court reaffirmed this ruling just last month in its Modified Order Granting  
 28 Plaintiffs' Motion for Permanent Injunction. Dkt. #551 (Aug. 5, 2013).



Opp. Br. at 1-2, 14-15.<sup>7</sup> Exactly how this relates to the issues of willfulness and innocent infringement is not clear, and Defendants do not, in their briefing, even attempt to make that connection. Regardless, as Defendants have now received that list from Plaintiffs, Defendants' contention is now moot in any event.<sup>8</sup> The issues are thus fully ripe for summary judgment now.

B. Willfulness Is Not To Be Assessed Separately As To Each Work.

Defendants contend that summary judgment as to willfulness is inappropriate because it is not clear that the infringements of all the works in suit "are so similar as to merit the same analysis." Defs' Opp. Br. at 14. This argument defies common sense, and the record of this case.

This Court found Defendants liable not for infringing any copyrighted work in particular, but rather for purposefully fostering indiscriminate infringement of copyrighted works on a mass scale. *E.g.*, 2009 WL 6355911, at \*14 (concluding that "Defendants' business model depends on massive infringing use"). Each of the infringements at issue was conducted in the same way: users of Defendants' websites uploaded and downloaded millions of copies of thousands of Plaintiffs' copyrighted works with abandon, and with Defendants' open encouragement and assistance. As such, Defendants did not have millions of distinct states of mind for

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<sup>7</sup> Of course, the only reason Defendants did not receive the list of works in suit sooner is that, for *over six years*, in violation of the Court's June 8, 2007 Order, Defendants refused to produce the website server log data necessary to prepare such a list. Defendants finally produced some of the website data just a little over two weeks ago, forcing Plaintiffs to revamp entirely their preparation of the list of works in suit. Defendants' delay is the subject of a separate application for sanctions currently pending before Magistrate Judge Chooljian.

<sup>8</sup> Defendants' argument that Plaintiffs' motion somehow seeks an advisory opinion, Defs' Opp. Br. at 17-18, is based entirely on Defendant's not having received the list of works in suit. With the list or works now in Defendants' possession, this argument, too, is moot.

1 each of these millions of acts of infringement. Instead, Defendants had a single state  
 2 of mind – to induce infringement – regardless of the particular copyrighted works in  
 3 question. *See, e.g., Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d  
 4 936, 944 (9th Cir. 2011) (holding, in secondary infringement case, that “a finding of  
 5 willfulness requires proof of no element beyond those of contributory copyright  
 6 infringement”); *Teevee Toons, Inc. v. MP3.com, Inc.*, 134 F. Supp. 2d 546, 546-47  
 7 (S.D.N.Y. 2001) (holding defendant to be collaterally estopped by finding of willful  
 8 infringement in earlier case involving different copyrighted works). The notion that  
 9 Defendants could credibly distinguish their intent with respect to any one work is,  
 10 on the record of this case, utterly fanciful.

11 In the end, Defendants’ argument that willfulness needs to be established on a  
 12 work-by-work basis is just a variant of the argument that inducement must be shown  
 13 on a work-by-work basis. That argument, however, has been rejected by the Court –  
 14 as well as by the Supreme Court and the Ninth Circuit. *Fung*, 2009 WL 6355911, at  
 15 \*19; *Grokster*, 545 U.S. at 941; *Fung*, 710 F.3d at 1035.

16 C. Causation Is Irrelevant To Willfulness And Innocent Infringement.

17 Scattered throughout Defendants’ brief are assorted references to the Ninth  
 18 Circuit’s discussion of causation. Defs’ Opp. Br. at 1, 2, 8, 12, 13, 20. Aside from  
 19 their unsupported assertion that “willfulness is a species of causation,” Defs’ Opp.  
 20 Br. at 1, Defendants make no effort to link the Ninth Circuit’s causation analysis to  
 21 the issue of willfulness. This is unsurprising, as the two are completely unrelated.

22 As framed by the Ninth Circuit, the question of causation concerned only the  
 23 extent to which downloads of Dot-Torrent files from websites *other than*  
 24 *Defendants’* could fairly be attributed to Defendants if the actual content  
 25 downloading process was managed by Defendants’ trackers. 710 F.3d at 1038-39.  
 26 In contrast, the issue of willfulness concerns the Defendants’ state of mind as to  
 27 downloads that *are already* attributable to Defendants – because each of the  
 28



1 infringements at issue emanates from a Dot-Torrent file downloaded from  
 2 Defendants' websites. As this Court has repeatedly found, causation is not an issue  
 3 where, as here, the Dot-Torrent file was downloaded from Defendants' websites.  
 4 *See. e.g.,* In Chambers Order Re Damages, Dkt. # 527, at 3 n.2 ("for BitTorrent files  
 5 downloaded from Defendants' websites, no causation dispute exists: Defendants  
 6 have caused the infringement"). There is, therefore, no connection between these  
 7 two issues, and Defendants' invocation of the Ninth Circuit's discussion serves no  
 8 purpose other than to confuse.

### 9 **III. Defendants Cannot Meet Their Burden To Show Innocent Infringement.**

10 In contrast to their approach to willfulness, Defendants make no independent  
 11 attempt to refute that a defense of innocent infringement is incompatible, as a matter  
 12 of logic and language, with a finding of inducement. Nor could they, as this Court's  
 13 finding that Defendants engaged in "purposeful, culpable conduct," 2009 WL  
 14 6355911, at \*15, is the very antithesis of innocent infringement, which requires the  
 15 defendant to prove that "such infringer was not aware and had no reason to believe  
 16 that his or her acts constituted an infringement of copyright." 17 U.S.C. § 504(c)(2).  
 17 As a result, the Court need not address whether the inclusion of copyright notices on  
 18 Plaintiffs' works is sufficient to defeat Defendants' innocent infringement defense,  
 19 as the defense is already foreclosed as a matter of law by the Court's finding that  
 20 Defendants intentionally infringed.

21 But even if the Court were to reach the issue of copyright notices, it should  
 22 still conclude that the defense is foreclosed here. Defendants' responses regarding  
 23 the placement of copyright notices are mere quibbles which, given that Defendants  
 24 now have the list of Plaintiffs' works in suit, are moot. With the list of works in  
 25 hand, Defendants are perfectly able to determine whether those works were  
 26 published with proper copyright notices. *See BMG Music v. Gonzalez*, 430 F.3d  
 27 888, 892 (7th Cir. 2005) (regardless of whether downloaded copies lacked copyright  
 28

1 notices, “the statutory question is whether ‘access’ to legitimate works was available  
 2 rather than whether infringers earlier in the chain attached copyright notices to the  
 3 pirated works”).

4 **IV. There Is No Basis For Granting Relief Pursuant To Rule 56(d).**

5 Defendants’ Rule 56(d) request is frivolous. As this Court admonished when  
 6 it rejected an earlier such request by these Defendants, Rule 56 requires Defendants  
 7 to provide “‘specified reasons’ that are ‘essential’ to the opposition.” 2009 WL  
 8 6355911, at \*18; *see* Fed. R. Civ. P. 56(d) (Court may defer consideration of  
 9 summary judgment motion if party opposing motion “shows by affidavit or  
 10 declaration that, for specified reasons, it cannot present facts essential to justify its  
 11 opposition”). “The burden is on the party seeking additional discovery to proffer  
 12 sufficient facts to show that the evidence sought exists, and that it would prevent  
 13 summary judgment.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F.  
 14 Supp. 2d 966, 993 (C.D. Cal. 2006) (quoting *Employers Teamsters Local No. 175 v.*  
 15 *Clorox Co.*, 353 F.3d 1125, 1129 (9th Cir. 2004) (quotation marks omitted)). Thus,  
 16 Defendants “must show: (1) [that they have] set forth in affidavit form the specific  
 17 facts [they] hope to elicit from further discovery; (2) the facts sought exist; and (3)  
 18 the sought-after facts are essential to oppose summary judgment.” *Burling v.*  
 19 *Windsor Equity Group, Inc.*, No. 2:12-cv-05371-SVW, 2012 WL 5330916, at \*6  
 20 (C.D. Cal. Oct. 18, 2012) (quoting *Family Home & Fin. Ctr., Inc. v. Fed. Home*  
 21 *Mortg. Corp.*, 525 F.2d 822, 827 (9th Cir. 2008)).

22 Defendants have not come close to meeting their burden. For example,  
 23 Defendants offer no specific argument as to how, given the nature of the  
 24 infringement here, their state of mind could vary for different individual works.  
 25 Neither do they even hint at how any other type of discovery would be relevant to  
 26 the issues of willfulness or innocent infringement. Defendants’ Rule 56(d) affidavit  
 27 contains nothing more than the vague assertion that “Defendants anticipate that the  
 28

1 facts revealed in this discovery will suffice to defeat Plaintiffs’ pending summary  
 2 judgment motions by showing that there are substantial and genuine issues of  
 3 material fact . . . including . . . Plaintiffs’ allegations that Defendants acted  
 4 willfully.” Golinveaux Dec. ¶ 6. This conclusory, non-specific statement is not  
 5 remotely sufficient to stave off summary judgment. *See Fung*, 2009 WL 6355911,  
 6 at \*18 (rejecting Defendants’ request to conduct additional discovery on the ground  
 7 that discovery sought by Defendants was “utterly irrelevant to the present Order”);  
 8 *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006)  
 9 (party must identify “the specific facts that further discovery would reveal, and  
 10 explain why those facts would preclude summary judgment”). The Court “need not  
 11 grant a Rule 56(d) continuance” in cases such as this one in which further  
 12 “discovery would be futile.” *Burling*, 2012 WL 5330916, at \*6. Defendants’ Rule  
 13 56(d) request for further discovery, therefore, should be rejected.<sup>9</sup>

#### 14 CONCLUSION

15 The motion for summary judgment should be granted.  
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22 <sup>9</sup> Defendants’ claim that Plaintiffs’ summary judgment motion is somehow  
 23 “untimely,” Defs’ Opp. Br. at 17, can be rejected outright. The scheduling order on  
 24 which Defendants rely as a bar to Plaintiffs’ motion was plainly intended to govern  
 25 only the proceedings of the liability phase, and did not purport to constrain or define  
 26 motion practice in the damages phase. The timing of the present motion is thus fully  
 27 consistent with that order, as well as the Federal Rules of Civil Procedure. *See Fed.*  
 28 *R. Civ. P. 56(a), (b)* (permitting a party to file a motion for summary judgment on  
 any claim or defense, “at any time until 30 days after the close of all discovery”).

1 Dated: September 16, 2013

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